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No. 03-1423

Supreme Court, U.S.
FILED
MAY 12 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DARIN L. MUEHLER and ROBERT BRILL,

Petitioners,

vs.

IRIS MENA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES SUPPORTING GRANT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The League of California Cities is an association of all 478 California cities. The League is united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys representing all 16 divisions of the League from all parts of the State. The committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance.

The League therefore has a direct interest in precedent-setting appellate decisions that may unjustifiably increase the risks of civil liability for municipal officials, while simultaneously deterring proper and effective law enforcement investigatory and safety practices, all to the detriment of the general welfare and the public safety. The decision of the Court of Appeals in this case constitutes such a precedent.*

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling that mere questioning by law enforcement officers constitutes a Fourth Amendment activity that must be independently justified is at odds with controlling precedent from this Court, other circuits,

* No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. The Respondents and the Petitioners have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

and the highest court of the State. If the Ninth Circuit's rule were permitted to stand, officials throughout its vast jurisdiction would be unreasonably and unjustifiably restricted in their abilities to engage in questioning necessary to secure the public safety and order against threats from all manner of criminal and terrorist activities.

In reaching its erroneous conclusion that the detention in this case was unreasonable, the Ninth Circuit confused discrete Fourth Amendment concepts, thereby deciding an important issue of constitutional law in conflict with relevant decisions of this Court as to the proper interpretation of the Constitution. The service of residential search warrants – which is already a high-risk activity – is made riskier for officers and residents alike under the Ninth Circuit's unwarranted departure from this Court's direction.

ARGUMENT

Under this Court's rules, certiorari may be granted when the decision of one United States court of appeals on an important legal issue conflicts with the decision of another, or with a decision of a state court of last resort (Rule 10(a)), or when the appellate decision conflicts with relevant decisions of this Court (Rule 10(c)). On all three grounds, and as to both questions presented, this is such a case.

***Question presented*: Whether law enforcement *questioning* during a detention is a separate Fourth Amendment "seizure."**

1. The decision of the Ninth Circuit directly conflicts with decisions of other circuits.

The Ninth Circuit said that the act of "inquiring unnecessarily" into Mena's immigration status while she was detained by officers during execution of a search warrant constituted "a violation of a constitutional right." *Mena v. City of Simi Valley*, 332 F.3d 1255, 1264 (9th Cir. 2003). In the Ninth Circuit's view, "the officer violated Mena's Fourth Amendment rights by questioning her citizenship status." *Id.*, at 1266, n.15. At least five times in its decision, the Ninth Circuit said that questioning during a detention is itself a form of Fourth Amendment "seizure" for which separate reasonable suspicion is required. This view is directly contrary to the rulings of at least two other circuits.

The Fifth Circuit, for example, has said that "we reject any notion that a police officer's questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation." *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993).

The Seventh Circuit has likewise held that "questions asked of persons involved in [temporary detentions] are not 'seizures' and thus do not require probable cause or reasonable suspicion." *United States v. Childs*, 277 F.3d 947, 951 (7th Cir.) (en banc), *cert. denied*, 537 U.S. 829 (2002).

The Seventh Circuit applied that rule in rejecting the argument that questioning a detainee about his citizenship violates the Fourth Amendment: "Questions, however,

are neither searches nor seizures, so . . . they did not constitute a seizure independent and distinct from the original investigatory stop." *Martinez Camargo v. I.N.S.*, 282 F.3d 487, 493 (7th Cir. 2002). (Citation omitted.)

2. The decision of the Ninth Circuit conflicts with decisions of the state court of last resort.

Regularly confronting the contention that a detention has occurred when police officers question a person about possible illegality, the California Supreme Court has said that "No Fourth Amendment privacy interests are invaded when an officer seeks a consensual interview with a suspect," *People v. Coddington*, 23 Cal.4th 529, 581, 2 P.3d 1081, 97 Cal.Rptr.2d 528 (2000), and that no antecedent suspicion was required, because no seizure occurred, where an officer "posed basic and preliminary questions to establish whether defendant might possess information concerning the crime." *People v. Hughes*, 27 Cal.4th 287, 328, 39 P.3d 432, 116 Cal.Rptr.2d 401 (2002).

3. The decision of the Ninth Circuit conflicts with relevant decisions of this Court.

For the immunity-defeating proposition that it has "long been the law" that police questioning requires particularized suspicion, the Ninth Circuit repeatedly cited this Court's opinion in *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). *See*, *Mena*, 332 F.2d at 1264-1267.

Neither *Brignoni-Ponce* nor any other decision of this Court has ever held or even *suggested* that separate justification is required before an officer may ask questions during a detention. As the opening sentence of

Brignoni-Ponce made clear, that opinion instead concerned the level of suspicion required *to make a vehicle stop*: "This case raises questions as to the United States Border Patrol's authority to *stop automobiles* in areas near the Mexican border." *Brignoni-Ponce*, 422 U.S. at 874. (Emphasis added.)

This Court's several decisions distinguishing consensual encounters from detentions teach that suspicionless questioning, including requests for identification and for consent to search, does not engage Fourth Amendment protections. *United States v. Mendenhall*, 446 U.S. 544, 555, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); *Florida v. Rodriguez*, 469 U.S. 1, 5-6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984); *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); and *United States v. Drayton*, 536 U.S. 194, 200-201, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002).

In this context, the Court has said, "[W]e have held repeatedly that mere police questioning does not constitute a seizure." *Bostick*, 501 U.S. at 434. Therefore, "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search. . . ." *Drayton*, 536 U.S. at 201. If questioning does not constitute a "seizure" of the person during the course of a consensual encounter, there is no reason to conclude that it nevertheless constitutes a separate "seizure" during the course of a lawful detention.

This Court's ruling in *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) is instructive. In

that case, Robinette had been lawfully stopped for highway speeding; after issuing a warning and returning the driver's license, the officer asked Robinette whether he was carrying any contraband in the car, whether he had any weapons or drugs, and whether the officer could search the car.

The Ohio court had ruled that because such questioning was "not related to the purpose of the original, constitutional stop," the resulting consent was invalid, requiring suppression of evidence. *Id.*, at 37-38. This Court reversed that ruling and found that the consent to search was not invalid, thereby indicating that questioning following a lawful detention requires no justifying suspicion. Again, if post-detention questioning does not constitute a "seizure" requiring separate suspicion, there is no reason to conclude that such questioning during a detention constitutes separate Fourth Amendment activity.

Thus, the Ninth Circuit's holding that questioning is a "seizure" requiring reasonable suspicion is at odds with the decisions of this Court, the state court of last resort, and the decisions of other circuits on this same issue.

The importance of the issue is great, for if officers cannot question those whom they lawfully detain, it would be difficult to obtain identification, to seek consent to search, or to obtain information to further legitimate investigations. The Ninth Circuit's rule requiring reasonable suspicion to justify investigative questioning "ignores the reality that police often are not yet aware of the exact sequence and scope of events they are investigating – indeed, that is why police must investigate in the first place. Deterred by the possibility of violating the [Fourth] Amendment, police likely would refrain from questioning

certain defendants altogether." *Texas v. Cobb*, 532 U.S. 162, 173-74, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001).

***Question presented*: Whether police unreasonably seize a detainee by initially pointing a firearm and subsequently handcuffing the detainee while a high-risk search warrant is served.**

1. The decision of the Ninth Circuit directly conflicts with decisions of other circuits.

In denying Muehler and Brill qualified immunity, the Ninth Circuit said that the allegations of Mena's complaint described a violation of a clearly-established right against being detained in an unreasonable manner. That court pointed to the allegations that officers on the entry team (not alleged to be either Muehler or Brill) pointed a gun at Mena when they first encountered her in bed, and kept her in handcuffs for two or three hours while the search was completed. These allegations, said the Court of Appeals, supported a conclusion that "her detention was objectively unreasonable. . . ." *Mena*, 332 F.3d at 1263. Other circuits, on similar facts, have come to the opposite conclusion.

For example, in *Washington v. Drug Enforcement Administration*, 183 F.3d 868 (8th Cir. 1999), police served a search warrant in a drug and murder investigation, breaking into the home of an elderly couple in the night with a battering ram, pointing guns at the couple, and using loud and threatening language to confine them at the kitchen table. The Eighth Circuit found that "The officers sought to gain immediate control of the situation, in order to protect themselves and the occupants, by drawing their weapons and using forceful language and

conduct," actions which were ruled reasonable under the circumstances. *Id.*, at 874.

In *Torres v. United States*, 200 F.3d 179 (3d Cir. 1999), officers serving a search warrant entered a house with a battering ram, initially pointed guns at a husband and wife, forced them to lie on the floor, and handcuffed them for one and one-half to three hours while the premises were searched for drugs. The Court of Appeals agreed that "The circumstances confronting the agents were such that they had reason to be concerned for their safety," overruling a claim of unreasonable detention. *Id.*, at 187.

In contrast, the Ninth Circuit ruled that officers serving a warrant in a gang-related drive-by-shooting case, where multiple padlocked doors impeded the search process (*Mena*, 332 F.3d at 1260), acted *un*reasonably in the similar precautions they took for safety and control. This ruling is manifestly inconsistent with the rulings of the Third and Seventh Circuits in the cases cited, and others.

2. The decision of the Ninth Circuit conflicts with decisions of the state court of last resort.

The California Supreme Court has said that anyone encountered at premises where a narcotics search warrant is being served presents such a risk of danger to the serving officers and others that it is not unreasonable for officers to exercise immediate and decisive control, including drawing and pointing a weapon, ordering the person to the ground, and handcuffing the person while the search is carried out. "They are steps a reasonably prudent officer could consider necessary to protect his own safety, that of the other searchers, and that of the detainee himself."

People v. Glass, 11 Cal.4th 354, 369, 909 P.2d 729, 45 Cal.Rptr.2d 425 (1995).

3. The decision of the Ninth Circuit conflicts with relevant decisions of this Court.

Mena's suit alleged, among other things, that "the officers detained her in an unreasonable manner." *Mena*, 332 F.3d at 1260. No reported allegations suggest any use of force against Mena by Muehler or Brill, or by any other officers. And yet, when considering the claim of detention in an unreasonable manner, the Ninth Circuit resorted to the test for *excessive force* under *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Said the Ninth Circuit, "To evaluate claims of unreasonable seizures and detentions . . . we apply the 'objective reasonableness' standard [from *Graham*] . . ." (*i.e.*, severity of crime, safety threats, active resistance or flight). Added by the Ninth Circuit to the list of "relevant" factors was an inquiry into whether the detention was unnecessarily painful, degrading, prolonged, or characterized by undue invasion of privacy. *Mena*, 332 F.3d at 1262.

This Ninth Circuit test is unworkably devoid of concrete guidance for police (what exactly does "degrading" mean, when is an invasion of privacy "undue," and why not simply analyze claims of unnecessary pain under the standard for excessive force?). Moreover, the Ninth Circuit's conflation of the three *Graham* excessive force factors with the four additional, ambiguous factors created by the Ninth Circuit does not faithfully apply the balancing test mandated by decisions of this Court for evaluating the reasonableness of *detentions*.

This Court did not hold, in *Graham* or elsewhere, that *all* Fourth Amendment reasonableness inquiries are to be decided by reference to the excessive force factors listed there. Rather, the nature of the particular Fourth Amendment claim must first be determined (unlawful detention? arrest? use of force? entry? search? property seizure?), and "The validity of the claim must then be judged by reference to the *specific* constitutional standard which governs *that* right, rather than to some generalized 'excessive force' standard." *Graham*, 490 U.S. at 394. (Emphases added.) Because the Ninth Circuit did not adhere to this approach, its decision is in conflict with this Court's specific instruction.

Instead of relying on the force-specific factors from *Graham* (as supplemented by its own four additional factors), the Ninth Circuit should have evaluated Mena's detention under the appropriate balancing test, under which would be "balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Maryland v. Buie*, 494 U.S. 325, 331, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

Having considered the strong governmental interests in preventing the flight of suspects and the destruction or concealment of evidence, as well as protection of police and others against surprise attack, this Court has already determined that where a "neutral and detached magistrate had found probable cause to believe that the law was being violated in that house," the balance weighs in favor of detaining the occupants while the search is completed, except in unusual circumstances. *Michigan v. Summers*, 452 U.S. 692, 704-05, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). The Ninth Circuit's opinion that Mena's detention fell into the exceptional category is supported by no

compelling arguments or analogous authority to distinguish this case from the majority of search warrant executions occurring regularly, where similar restraints and precautions are routinely employed to deal with the recurring threats of flight, assault and destruction of evidence.

The detention of Iris Mena while officers looked for firearms and other shooting and gang-related evidence in a structure suspected of harboring the drive-by shooter, where the doors of multiple rooms were found to be padlocked, does not suggest an exceptional or unusual reason for dispensing with ordinary control and safety precautions. In such a case, officers act with necessary prudence in initially covering occupants with their weapons until being assured that no immediate threat exists, and in handcuffing adult occupants while the search is carried out, to prevent flight, destruction of the evidence, or surprise assault.

In this case, there is no evidence suggesting that the officers were aware, before completing their search and investigation, whether Mena might be associated with the gang, whether she had access to any weapons or evidence that might be secreted on the premises, or whether she might present a risk of deadly surprise during the search. This Court has properly noted the safety risks confronting officers in the unfamiliar territory of a private residence, which "puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." *Buie*, 494 U.S. at 333.

Given this Court's analysis in *Summers*, and in view of this Court's directives with respect to the proper analytical framework for evaluating Fourth Amendment reasonableness, the Ninth Circuit's ruling that Mena's detention violated the Fourth Amendment is in conflict with relevant decisions of this Court, on an important legal issue. Because the fear of civil liability for detaining and questioning those present during searches performed pursuant to judicial warrant will significantly and unjustifiably inhibit law enforcement officers in the performance of their duties under the Ninth Circuit's ruling, the 478 cities comprising the League of California Cities strongly believe this erroneous decision must be reversed.

CONCLUSION

Equating "questioning" to "seizing" would substantially curtail legitimate investigative options for law enforcement officers who stand between the victim and the criminal, and between the homeland and the terrorist. Forbidding firearms readiness and restraint by handcuffs during high-risk police operations would force officers to choose between safety and duty. "Certainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry v. Ohio*, 392 U.S. 1, 23, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

As to both important questions presented, the Ninth Circuit's decision is in conflict with decisions of other circuits, the state's high court, and this Court. Also, it is unacceptably wrong. The petition for writ of certiorari should be granted.

Respectfully submitted,

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